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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-5187

PHILLIP JEROME LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

CONRAD KELLENBERG
Notre Dame Law School
Notre Dame, Indiana 46556

Court-Appointed Counsel for Petitioner

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 539 F.2d 612 (App. p. 17). The United States District Court for the Northern District of Indiana did not issue an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1976 (App. p. 17). The petition for a writ of Certiorari was filed on August 9, 1976, and was granted on January 10, 1977. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Was the petitioner deprived of his right not to be put twice in jeopardy of life or limb, or deprived of his liberty without due process of law, if his motion for dismissal of the defective information, made at the pretrial stage, was taken under advisement and not decided by the trial court until all the evidence had been heard, the information was then dismissed just before a verdict was rendered, and a second complete trial was had, which resulted in conviction?

STATUTES INVOLVED

The portion of the United States Constitution involved is the Fifth Amendment, which reads in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . .

The statutes involved in the information filed against the defendant are Title 18, U.S.C. Section 13, and Section 10-3030 Burns Indiana Statutes (App. p. 5).

STATEMENT OF THE CASE

On February 6, 1974, petitioner Phillip Jerome Lee was charged in an information with violating Title 18, United States Code Sec. 13 and Section 10-3030 Burns Indiana Statutes. The information alleged a theft by petitioner of property belonging to Charles Bilskie, on land acquired for the use of the United States and under the exclusive jurisdiction thereof.

Petitioner waived his right to trial by jury. On July 16, 1974, prior to the commencement of the trial, petitioner moved to dismiss the information because it failed to allege that the offense was committed knowingly and with the intent to deprive the owner of the use and benefit of the property. Hon. Jesse Eschbach, in the District Court for the Northern District of Indiana, stated that he would not rule on the motion at that time and took it under advisement (1st Tr. Trans. pp. 3-5, App. pp. 7-9). The Court proceeded to hear the entire case. After both sides rested, and before any verdict was given, the District Court dismissed the information. The District Court stated that the defect in the information was obvious on its face: "No such allegation is contained, no matter how I stretch my imagination when I read the Information. There is nothing here that even smacks of an element of intent." (1st Tr. Trans. pp. 67-68, App. p. 13).

On September 25, 1974, a Grand Jury returned an indictment charging the petitioner with the same crime concerning the same event. This indictment was drawn so as to cure the defect in the information. On June 23, 1975, the petitioner was tried in a bench trial before Hon. Robert Grant, Judge Eschbach having disqualified himself. The petitioner was found guilty at

the second trial, and on August 9, 1975, petitioner was sentenced to be imprisoned for one to five years, and to be disenfranchised and rendered incapable of holding any office of trust or profit for a period of five years.

A direct appeal was taken to the United States Court of Appeals for the Seventh Circuit. In a decision rendered July 21, 1976, that Court affirmed. The opinion is found at 539 F.2d 612.

SUMMARY OF ARGUMENT

Prior to the commencement of petitioner's first trial, he objected to the sufficiency of the charging information. Instead of ruling on the motion or granting a continuance to research the law, the trial court took the motion under advisement and, in a bench trial, heard all the evidence. Before any verdict was given, the trial court granted petitioner's motion and dismissed the action. The Government indicted petitioner for the same crime, and a second trial was held, which resulted in conviction. That second trial was barred by the Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment.

ARGUMENT

I.

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL

A. Introduction

The Double Jeopardy Clause is an essential bulwark in the protection of individuals from prosecutorial or judicial abuse. It enunciates a "policy of avoiding multiple trials, [which] has been regarded as so important that exceptions to the principle have only been grudgingly allowed."[1]

Every case in this Court in which it was held that a defendant was not entitled to invoke the protection of the Double Jeopardy Clause falls into at least one of three categories: 1) The first trial was terminated at an early stage—"before the attachment of liability"; 2) The first trial was prosecuted up through a verdict of guilty against the defendant; or 3) The first trial was terminated by a mistrial required by "manifest necessity," such that the "ends of public justice" suggest that it would be unfair to have precluded the Government from proceeding with a second prosecution.[2]

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[1] *United States v. Wilson*, 420 U.S. 332, 343 (1975).

[2] This category is the most difficult to describe by a short-hand rule. "[V]irtually all of the cases turn on the particular facts and thus escape meaningful categorization . . ." *Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

The case at bar falls into *none* of these categories. Therefore, the Double Jeopardy Clause should bar a second trial.

Without a doubt, "liability attached" at the first trial. Not only is the *Serfass* test,[3] of beginning to hear evidence, satisfied; here *all* the evidence was heard. Second, in contrast to cases in which a judgment was reversed on appeal, in this case the trial court declined to render a verdict; after the evidence was heard, the court agreed that the information charging defendant was plainly defective. Finally, there were numerous alternatives to proceeding in this highly prejudicial manner. There was no "manifest necessity" for having two trials.

Petitioner suggests that there are sound policy reasons why the Constitution requires the invocation of the Double Jeopardy Clause when none of the above three situations exists. The cases in this Court clearly support such a result.

B. There are Compelling Policy Reasons for Invoking the Protection of the Double Jeopardy Clause

Historically, the Double Jeopardy Clause was a mechanism for protecting individuals from excessive zeal on the part of the prosecutor. Trial by jury and an independent judiciary are some devices to protect the

[3] *Serfass v. United States*, 420 U.S. 377, 388 (1975). See text accompanying fn. 7, *infra*.

individual. But the Double Jeopardy Clause was directed at a particular evil. Absent it, a prosecutor might bring continued actions against an individual, for the same alleged crime, until some judge or jury were willing to acquiesce in a guilty verdict. Therefore, the double Jeopardy Clause, in its simplest form, is directed at preventing multiple prosecutions; it states that once an individual is tried, he may not be charged with, or tried for, the same offense.[4]

The Double Jeopardy Clause serves additional functions. It is clear that the very process of undergoing trial is a traumatic experience. It goes without saying that the pretrial and trial processes cause anxiety and embarrassment for the defendant, for he faces the very real risk that he will be deprived of his life or liberty. This emotional harm is compounded by the adverse publicity in the media, the embarrassment to him, his family and friends, financial expense, possible loss of job, and the social ostracism that result from the criminal process. Therefore, the Double Jeopardy Clause proclaims a policy that, absent compelling need, it is improper—in fact, unconstitutional—to subject an individual to these traumas more than once.[5]

[4] "[T]he underlying premise was generally that a defendant should not be twice tried or punished for the same offense." *United States v. Wilson*, 420 U.S. 332, 339 (1975).

[5] "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ." *Green v. United States*, 355 U.S. 184, 187 (1957).

Finally, the Double Jeopardy Clause furthers notions of procedural fairness. It contains a due process concept. Any trial attorney would have a greater chance of success if he or she could first have a dress rehearsal of the trial–complete with defendant, witnesses and judge–prior to the "trial that counted." Absent the Double Jeopardy Clause, the prosecution could learn if the defendant would take the stand in his own behalf, and if so, what he would testify to. The prosecution could learn the questions that the defendant would ask of the prosecution's witnesses on cross-examination. The prosecution could learn every detail of the defendant's alibi. The prosecution could learn which of its witnesses performed well under the stress of trial, and which witnesses might best not be used at the second, "real trial." Therefore, the Double Jeopardy Clause cuts off this option unless there is a "manifest necessity" for holding a second trial.[6]

C. The First Trial Clearly Went Beyond the Point at Which Jeopardy Attached, Since the Trial Court Heard all the Evidence

Crucial to the invocation of the Double Jeopardy Clause is a determination of when jeopardy "attaches."

> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." . . . In the case of a jury trial, jeopardy attaches when a jury is empanelled and sworn. . . . In a non-jury trial, jeopardy attaches *when the court begins to hear evidence*.[7]

[6] *United States v. Perez*, 9 Wheat. 579 (1824).

In the case at bar, since the trial court not only *began to hear evidence*, but in fact *heard the entire case*, there can be no doubt that jeopardy attached.

The opinion of the court below suggests that, notwithstanding the fact that jeopardy "attached," there was in fact "no trial" because the information was defective. The theory would appear to be that since, as a matter of law, the defendant could not have been convicted under that information, the entire procedure was void *ab initio*, and the court at the second trial could act as if the first trial had never taken place.[8]

One hardly needs citations for the principle that people have been imprisoned notwithstanding the fact that the indictment or information charging them with a crime was defectively drawn.[9] The defect may not be recognized until the appellate process has run its course, often several years after the defendant is initially deprived of his liberty. In fact, the defect may not be recognized until years later, only upon collateral attack, or even not at all, since the defendant may already have

[7] *Serfass v. United States*, 420 U.S. 377, 388 (1975) (Emphasis added) (Citations omitted).

[8] This Court has firmly rejected such an argument if the defendant was acquitted, even when the indictment was so defective that it could not have supported a conviction. *United States v. Ball*, 163 U.S. 662 (1896).

[9] See *United States v. Ball*, 163 U.S. 662, 668 (1896): "Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits."

been released from incarceration. Thus, to suggest that petitioner could "never" have been deprived of his liberty on this information is either naive or disingenuous.

The opinion below overlooks two of the underlying policy reasons for having double jeopardy protection. First, even if, on appeal, it would turn out that any conviction would have to be reversed, and even if the defendant was not deprived of his liberty in the meantime, the petitioner did not know this while the first trial was taking place. Indeed, since the judge took the matter under advisement, the judge himself apparently was not sure about the state of the law. Thus, both before and during the entire first trial, the petitioner was in genuine fear that he would be deprived of his liberty. One purpose of the Double Jeopardy Clause is to prevent a person from having to undergo this same traumatic experience more than once from prosecutions arising out of the same incident.[10]

Second, another policy objective of the Double Jeopardy Clause is to prevent the prosecution from having a dress rehearsal of the actual trial. Even if it is true that the first proceeding could not, as a matter of law, have resulted in a valid conviction, the petitioner suffered the same disability; he had his trial strategy laid bare before the prosecution. Before the trial began, the petitioner objected that the information against him was defective, and that there was no proper basis for proceeding with the trial. By postponing a decision until after the trial was over but without pronouncing a verdict, the trial judge gave the prosecutor the opportunity to preview the evidence in the case, at no risk to

[10]*Green v. United States*, 355 U.S. 184 (1957).

the prosecutor that the petitioner would be acquitted, but at a very high cost to the defendant.[11]

What took place here was more than just pre-trial discovery of the defendant in a criminal case—a procedure, not so incidentally, which to the extent enjoyed in this case, is foreign to our system. It was a full scale dress rehearsal, with the petitioner having his life and liberty put in jeopardy and experiencing the trauma of being put to trial. It is such a procedure which the Double Jeopardy Clause of the Fifth Amendment proscribes.[12]

[11]The evidence at the two trials was so similar that the Assistant U.S. Attorney was able to use the transcript of the first trial as a script for questioning witnesses at the second trial.

"THE COURT: I imagine that if the information that is presented here—which I gather from the way the prosecutor followed the transcript was probably about the same as it was in the other trial—thus it came as no surprise to this defendant.

"By the way; is that true, Mr. Gray?

"MR. GRAY [Assistant U.S. Attorney]: I'm sorry, Your Honor. Were you discussing the transcripts from the first case?

"THE COURT: Yes. That is, did the evidence generally follow what was presented before?

"MR. GRAY: Yes."

(2nd Tr. Trans. p. 89, App. p. 15).

[12]Compare *Ashe v. Swenson*, 397 U.S. 436, 447 (1970): "In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated *the first trial as no more than a dry run for the second prosecution . . . But this is precisely what the constitutional guarantee forbids.*" (Emphasis added). Although petitioner does not suggest that here the prosecution intended to use the first trial as a dress rehearsal, the actual result was clearly the same.

D. Double Jeopardy Protection May Be Invoked When the First Trial Did Not Result In a Conviction and a Reversal Thereof

It is generally accepted that if the first trial results in a conviction, which is then set aside either by the trial judge or by an appellate court, the Double Jeopardy Clause does not preclude a retrial. This principle is reflected in a line of cases beginning at least as early as *United States v. Ball*, 163 U.S. 662 (1896) and reaffirmed as recently as *United States v. Wilson*, 420 U.S. 332 (1975).[13] The very reasons for permitting reprosecution even though the conviction is infected with error suggest why a second trial should *not* be permitted when there is *no* conviction in the first trial.

First, the Double Jeopardy Clause is said to protect the defendant's "valued right to have his trial completed by a particular tribunal."[14] Obviously, in the

[13]Other cases so holding include *United States v. Tateo*, 377 U.S. 463 (1964); *Forman v. United States*, 361 U.S. 416 (1960); *Bryan v. United States*, 338 U.S. 552 (1950); and *Stroud v. United States*, 251 U.S. 15 (1919).

On the other hand, it is clear that if the defendant is convicted of a lesser included offense but is acquitted of the more serious offense, he may not be retried for the latter offense even if the conviction is set aside on appeal. *Green v. United States*, 355 U.S. 184 (1957); *Benton v. Maryland*, 395 U.S. 784 (1969).

[14]*Wade v. Hunter*, 336 U.S. 684, 689 (1949), quoted in *United States v. Jorn*, 400 U.S. 470, 484 (1971).

It is interesting to note that "jeopardy" is derived from the Old French *jeu parti*, literally meaning "divided game." Merriam-Webster's Seventh New Collegiate Dictionary, p. 455. This carries the suggestion that in both the game and the trial, there must be a decision or verdict. Each participant is entitled to continue until he wins or loses. In court, as in sport, it is inappropriate for one side to stop when he thinks he may be behind, only to start again before a different referee.

case of a conviction, this right is preserved to the defendant, albeit unsuccessfully from his point of view. He was given the opportunity to be acquitted. However, in the case at bar, by terminating the trial after all the evidence was introduced, but before the verdict was announced, the petitioner was deprived of this valued right.

Second, this Court has held in *Green v. United States*, 355 U.S. 184, 189 (1957) that the defendant's taking an appeal after a conviction operates as a waiver of the Double Jeopardy Clause, since he is interested in having the first verdict set aside. However, in the case at bar, since there was no verdict from which to appeal, there is no implied waiver. Therefore, the petitioner is entitled to insist upon the protection afforded him by the Fifth Amendment.[15]

[15]Reliance on this "waiver" theory has recently been questioned.

> This exception to the "one trial" rule has been explained on the conclusory theories that the defendant waives his double jeopardy claim by appealing his conviction, or that the jeopardy continues until he is acquitted or his conviction becomes final, see *Green v. United States*, 355 U.S. 184, 189 (1957). As Mr. Justice Harlan noted in *United States v. Tateo*, 377 U.S. 463, 465-466 (1964), however, the practical justification for the exception is simply that it is fairer to both the defendant and the Government. *United States v. Wilson*, 420 U.S. 332, 343-44, n. 11 (1975).

This "fairness" concept—which is similar to the *Perez* standard of "manifest necessity" and the "ends of public justice"—will be discussed in the next section of this brief. See text with fn. 18, *infra*.

In its opinion, the Seventh Circuit analogized the case at bar to *Ball*. The court stated that "[h]ad Lee's motion to dismiss been denied and had he been found guilty, his appeal would likely have resulted in a reversal and a remand for retrial. Under *United States v. Ball, supra*, a new trial would not constitute double jeopardy."[16] The analogy the court draws has surface plausibility. But the fact remains that petitioner was *not* convicted, and no amount of analogizing can add this element. Therefore, if the Double Jeopardy Clause is held not to protect petitioner, it must be because of some "manifest necessity" respecting the dismissal of the case immediately prior to the time for the verdict—a question to which we now turn.

E. A Second Trial is Not Allowed, Since the Timing of the Dismissal Was Not Dictated By "Manifest Necessity" Or the "Ends of Public Justice"

The most elusive category of cases—in which this Court has allowed a second trial after the first trial was terminated by a dismissal or mistrial—is

> premised on the "public justice" policy enunciated in *United States v. Perez* [9 Wheat. 579 (1824)]. . . . A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.[17]

[16]539 F.2d at 614 (App. p. 20).

[17]*Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

This is a refinement of the *Perez* standard, which held that "the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[18] But this Court has also made clear that this right to conduct a second trial is a very limited one.[19]

This Court has observed that the cases permitting or prohibiting a retrial subsequent to the termination of the first trial "escape meaningful categorization."[20] However, an examination of the "particular facts"[21] of those cases may prove helpful. Let us first examine some cases in which a second trial was permitted.

In the most recent decision—*United States v. Dinitz*, 424 U.S. 600 (1976)—a retrial subsequent to the mistrial was approved because of the refusal of the defendant to proceed with the trial with his alternate attorney following contemptuous behavior on the part of his principal attorney. In *Gori v. United States*, 367 U.S. 364 (1961), the mistrial was ordered to protect the defendant when the trial court feared that the prosecutor's line of inquiry would improperly inform the jury of prior crimes committed by the defendant.

[18]9 Wheat. at 580.

[19]"The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed." *United States v. Wilson*, 420 U.S. 332, 343 (1975).

[20]*Illinois v. Somerville*, 410 U.S. 458, 464 (1973).

[21]*Id.*

In *Lovato v. New Mexico*, 242 U.S. 199 (1916), the trial court dismissed the already impanelled jury because the defendant's demurrer to the indictment was technically insufficient. In *Keerl v. Montana*, 213 U.S. 135 (1909), the Court followed an established line of cases[22] allowing retrial if the mistrial was the result of the inability of the jury to agree on a verdict.

Finally, *Illinois v. Somerville*, 410 U.S. 458 (1973), is instructive because its facts appear, on the surface, to be quite similar to the facts in the case at bar, and therefore it was the principal decision relied on by the Seventh Circuit in affirming petitioner's conviction. The defendant in *Somerville* had been indicted by an Illinois grand jury for the crime of theft; however, the indictment failed to allege that the defendant intended permanently to deprive the owner of his property. As a matter of state law, such an indictment was fatally defective, and this fault could be raised on appeal or even by collateral attack. Therefore, after a jury had been impanelled, the trial court declared a mistrial. Even though the case had reached the stage at which jeopardy had attached, this Court held that the Double Jeopardy Clause did not preclude a second trial, in view of the "manifest necessity" doctrine enunciated in *Perez*.

There are critical differences between *Somerville* and the case at bar. In *Somerville*, no evidence was introduced before the mistrial was declared. Here, the *entire case* was tried before the judge dismissed the action. In *Somerville*, the dismissal was ordered immediately after the court's attention was called to the

[22] *Moss v. Glenn*, 189 U.S. 506 (1903); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Perez*, 9 Wheat. 579 (1824).

defect. Here, the case proceeded, while the trial court took the petitioner's motion under advisement.[23] In *Somerville*, it was the declaration of the mistrial that was objected to by the defendant, while here, the petitioner objected to proceeding with the trial.

The Court's decisions refusing to permit a second trial after the dismissal or the declaration of a mistrial also reflect the basic policies of the Double Jeopardy Clause. In *Downum v. United States*, 372 U.S. 734 (1963), after a jury was impanelled (and therefore after jeopardy had attached), the prosecution discovered that a key witness for two of the six counts was absent. Although the defendant expressed a desire to proceed immediately on the other four counts, the judge dismissed the jury. A new jury was impanelled two days later. This Court held that the delay operated as a continuance solely for the benefit of the prosecution and held the second trial barred.[24] In *United States v. Jorn*, 400 U.S. 470 (1971), the jury was dismissed and a mistrial ordered because the trial judge felt that the prosecution witnesses had not been adequately advised of their rights against self-incrimination. This Court barred the second trial because this procedure deprived

[23] As suggested elsewhere, see text with fns. 14 and 27, in the case at bar, since testimony was taken, the petitioner was entitled to proceed up through a verdict, on which he might have been acquitted.

[24] In *Downum*, the trial court's ruling interfered with the defendant's choice—to proceed with the trial. In the case at bar, the trial court's denial of petitioner's objection to the information also interfered with his choice—in this case, *not* to proceed with the trial. The effect of both rulings is an interference with constitutionally protected rights.

the defendant of the right to proceed before a tribunal that might have been favorable to him.

A recent decision invoking the protection of the Double Jeopardy Clause is *United States v. Jenkins*, 420 U.S. 358 (1975). Following a bench trial, the trial court *dismissed* the indictment and discharged the defendant.[25] This Court held that an appeal by the Government was foreclosed[26] because it was unclear whether the adjudication was on the factual merits or the result of the district court's view of the prevailing legal standard. "The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's [defendant's] favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause."[27] 420 U.S. at 370.

[25]In *Jenkins*, this Court emphasized that there is an important distinction between an action terminated by mistrial and one terminated by dismissal: "[W]e think it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." 420 U.S. at 365, n. 7. It bears emphasis that the case at bar was *dismissed*, and *not* terminated by mistrial: . . . "I must *dismiss* this case because the Information was improperly drawn. . . . I have to *dismiss*." (1st Tr. Trans. p. 67, App. p. 13) (Emphasis added).

[26]The standard under the statute giving the Government the right to appeal—Title 18, U.S.C. Sec. 3731—is the same as that of the Double Jeopardy Clause. See, e.g., *United States v. Jenkins*, 420 U.S. 358, 364, 366.

[27]It is true that the district court judge stated that he believed that the petitioner's guilt had been proven beyond a reasonable doubt. But, since this statement was immediately followed by the dismissal of the action, this "verdict" can be viewed as completely gratuitous. It is arguable that the trial judge might have reflected considerably longer before pronouncing a verdict, and that the verdict might have been different, had the judge known that the petitioner would have been imprisoned instead of discharged.

This Court has pointed to various factors to determine whether the dismissal or declaration of a mistrial precludes a second trial. One factor is whether the mistrial comes at the defendant's request.[28] In the case at bar, the motivating force is difficult to pinpoint. It is true that it was the petitioner who, prior to the trial, called the court's attention to the defective information and moved to have the action dismissed immediately. On the other hand, the underlying defect was entirely the result of the Government's oversight,[29] and the timing of the dismissal was solely the result of the trial court's earlier inaction.

Even if the dismissal is deemed to be at the petitioner's election, there are other factors to consider. One method of determining the "manifest necessity" of the trial judge's declaration of a mistrial at a particular stage is suggested by Mr. Justice Marshall's dissenting opinion in *Somerville*—consider the alternatives available to the trial judge.[30] In *Somerville*, this Court held that

[28]"The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause." *United States v. Dinitz*, 424 U.S. 600, 608 (1976).

In *United States v. Jorn*, 400 U.S. 470 (1971), the Court held that a retrial was precluded even though the declaration of the mistrial was not requested by the defendant; the trial court ordered it *sua sponte*. The foreclosure of a second trial is therefore even more appropriate here, where the petitioner's motion called the trial court's attention to the defect and the court nonetheless proceeded with the trial.

[29]See fn. 33, *infra*.

[30]"The first element to be considered is the necessity for declaring a mistrial. That I take to mean consideration of the alternatives available to the judge confronted with a situation in the midst of trial that seems to require correction." 410 U.S. at 478.

(continued)

it would be wasteful if public policy were to require that the first trial continue with full knowledge that it was a charade, that the conviction—if it were obtained—would have to be reversed on appeal, and that a second trial would have to be held.[31] In that case, the option of a continuance was not available; it would have been highly impractical for the trial judge to keep together the jury, which had already been impanelled, while the prosecution went before the grand jury to obtain a new indictment.

In the case at bar, however, such practical problems were not present. The trial judge did not rule on defendant's motion before the trial started because, he claimed, it was only presented on the morning of trial

(footnote continued from preceding page)

Since *Somerville*, a majority of this Court has also adopted as a standard for evaluating the propriety of a mistrial the question of whether the trial court properly weighed the alternatives available to him. In *United States v. Dinitz*, 424 U.S. 600, 604 (1976), the trial court offered the defendant three alternative courses; one such course, the declaration of an immediate mistrial, was the option chosen by the defendant. The Court emphasized that the "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." 424 U.S. at 609. By taking petitioner's motion under advisement, rather than ruling on it immediately or granting a continuance, the District Court here deprived the petitioner of that control.

[31]The Court's opinion states: "If a mistrial were constitutionally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy, and money for all concerned." 410 U.S. at 469. In the case at bar, the trial judge did the exact opposite. He wasted the time, money and energy of both sides by continuing the obviously fruitless trial.

and he would have to do some research.[32] Therefore, the judge allowed the trial to proceed, and then, once the trial was over, without any further argument by counsel, he dismissed the action.

It is difficult to understand why the trial judge found it necessary to take the petitioner's motion under advisement. When the testimony had concluded, the trial judge thought it perfectly clear that the information was defective.[33] If it was so obvious at 11:30 a.m., it is impossible to say that the alternative that the judge chose at 9:45 a.m.—of taking the motion under advisement and hearing the entire case—was the only sound alternative available to him.

Since the action was being tried without a jury, there was no reason whatsoever why the trial court could not instead have ordered a continuance, *prior* to starting the

[32]"It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of trial to research them" (1st Tr. Tran. p. 3. See App. p. 8).

[33]"I must dismiss this case because the Information was improperly drawn. Whoever drew it up didn't even look at the Indiana statute. . . .

"*The briefest examination of the statute* establishes that knowingly is an [element of the] offense. . . . No such allegation is contained, no matter how I stretch my imagination when I read the Information. . . .

"Mr. Gray [the Assistant U.S. Attorney], I am not condemning you, I don't know who drafted it, but I can tell you if a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course. You may carry that complete message back to your department." (1st Tr. Trans. pp. 67-68, App. p. 13-14) (Emphasis added).

trial, to do that research.[34] Once that research disclosed that the information was defective, the prosecution would then have had the opportunity to redraft it. Here, there simply was no "manifest necessity" for proceeding in a fashion that was calculated seriously to interfere with the petitioner's constitutional rights.[35]

The "manifest necessity" doctrine means more than that a trial court may terminate a proceeding infected with error. The implication of *Somerville* is that in certain cases the trial court may have a *duty* to declare a mistrial at a particular stage. Failure to dismiss the case at that time–when "manifest necessity" would so require–will mean that a later dismissal will preclude a retrial.[36]

[34]In view of the failure of the trial court to order a continuance *sua sponte*, it would have been appropriate for the prosecution to request the continuance, rather than sit back passively while the petitioner unsuccessfully asserted his rights. The U.S. Attorney may not have been personally responsible for drafting the defective information (see fn. 33). However, once the defendant called attention to the obvious defect, the U.S. Attorney was grossly negligent in not noting the defect and either moving for a continuance or joining in defendant's motion for an immediate dismissal. Such a course–which places only a small burden on the prosecution–would have prevented the constitutionally defective procedure eventually followed.

[35]Petitioner concedes that a very different case would be presented if a defendant had moved to dismiss the information only during or after the trial, and the motion were immediately granted. Such a defendant would be said to have waived the prejudicial effect of the introduction of any evidence up to that point by the untimeliness of the motion. However, the petitioner challenged the information at an early stage; it was prejudicial error for the trial court not to rule on the motion immediately, or at least grant a continuance to research the law.

[36]It is hard to say that once the testimony is concluded, "the declaration of a mistrial [and, a fortiori, a dismissal–see fn. 25, *supra*] was dictated by 'manifest necessity' or the 'ends of public justice.' " *Illinois v. Somerville*, *supra* at 463.

The Court below made much of the fact that the petitioner did not insist upon not proceeding with the first trial.[37] In fact, the defendant objected to the sufficiency of the information minutes before the court began to hear the evidence, and the court obviously had refused to rule upon the motion at that time. It would be elevating form over substance to require the defendant adamantly to insist that the trial be delayed until the judge ruled on the motion–in the face of the court's clear ruling–before the defendant would be entitled to rely on an essential constitutional right. Especially in a bench trial, counsel should not be required to press an objection and thereby risk provoking the ire of the trial judge.

In addition to the protection he is afforded by the appointment of counsel, the court and the prosecution also have a duty to protect the rights of defendants.[38] The court should, on its own initiative, have ordered a brief continuance so that it could research the law.

There is a third consideration determinative of the right to conduct a second trial subsequent to a dismissal or mistrial–whether the action was dismissed immediately upon the recognition of the facts necessitating

[37]"Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial." 539 F.2d at 614 (App. p. 20).

[38]"[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest 'that justice be done.' " *United States v. Agurs*, ____ U.S. ____, 96 S. Ct. 2392, 2401 (1976).

"The duty of the prosecutor is to seek justice, not merely to convict." Sec. 1.1(c), Standards Relating to the Prosecution Function, American Bar Association Project on Standards for Criminal Justice.

that mistrial, or whether the trial continued nonetheless:

> But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, *he may have little interest in completing the trial* and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause–the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions. . . . In the event of severely prejudicial error *a defendant might well consider an immediate new trial a preferable alternative* to the prospect of a probable conviction followed by an appeal, a reversal of the conviction, and a later retrial.[39]

In such cases as *Somerville* and *Gori*, the mistrial was ordered as soon as the defect was pointed out or became apparent to the trial court. Here, however, instead of granting him the immediate termination that he had requested, the court proceeded with the case, heard all the evidence, and only then dismissed the action. It is improper to make a defendant sit through a trial, over his objections to a defective information, knowing that he will have to do it all over again.[40] As

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[39]*United States v. Dinitz*, 424 U.S. 600, 608, 610 (1976) (Emphasis added).

[40]Of course, if he is unaware of the defect, then he is put in fear twice–something the Double Jeopardy Clause also proscribes.

this Court stated in *Dinitz*, such a procedure is inconsistent with the protection the Double Jeopardy Clause affords a defendant.

II.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BARS PETITIONER'S RETRIAL

The Due Process Clause of the Fifth Amendment requires that the United States adhere to certain procedural standards before depriving a person of life, liberty or property. The general limits of this requirement have been defined many times by this Court. One often-quoted statement is that

> [r]egard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain *whether they offend those canons of decency and fairness* which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." *Rochin v. California*, 342 U.S. 165, 169 (1952) (Emphasis added).

That the content of the Double Jeopardy Clause may be different from that of the Due Process Clause is clear. The extent of that difference is not nearly so clear.

Prior to 1969, this Court had held that the Double Jeopardy Clause did not apply to the states through the Due Process Clause of the Fourteenth Amendment

under the "incorporation principle."[41] Thus, in *Brock v. North Carolina*, 344 U.S. 424 (1953), the question of whether a state could retry a defendant whose trial was terminated by mistrial was limited to the protection afforded by the Fourteenth Amendment. In approving the second trial, this Court stated:

> Justice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury. As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case. 344 U.S. at 427-28.

An indication of a situation in which the second trial would be barred by the Due Process Clause is found in Mr. Justice Frankfurter's concurring opinion in *Brock*:

> A State falls short of its obligation when it . . . prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time. 344 U.S. at 429.

In *Benton v. Maryland*, 395 U.S. 784 (1969), this Court overruled *Palko* and held that the Due Process Clause of the Fourteenth Amendment incorporated the Double Jeopardy Clause, and that the latter Clause applied to the states as well as to the federal government. This decision would suggest that in the area of repetitive trials, the limits of these two protections are congruent. However, in a decision announced on the

[41] *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

same day as *Benton*, this Court considered a defendant's challenge to a longer sentence imposed on him after a second trial, than had been given him after his successfully-appealed first trial. *North Carolina v. Pearce*, 395 U.S. 711 (1969) held that this practice was not defective under the Double Jeopardy Clause (although that now applied to the states under the Fourteenth Amendment), but that it might nonetheless be inconsistent with the Due Process Clause. This Court remanded the decision, requiring that the second trial court at least articulate reasonable grounds for the longer sentence. Thus, it is suggested that, where fairness to the defendant is implicated by repetitive trials, the limits of the Due Process Clause are somewhat broader than those of the Double Jeopardy Clause.

The errors in the first trial discussed in the first portion of this brief—the gross defect in the information; the trial court's inability to recognize this defect when the petitioner's motion first brought it to his attention; the trial court's failure to order a continuance to research the sufficiency of the information; the prosecutor's failure to take any action when the petitioner moved to dismiss the information;[42] the admission of all the evidence at the first trial, and then the dismissal of the action without any verdict—are sufficiently egregious that the allowance of a second trial against petitioner does indeed "offend . . . canons of decency and fairness," and so violated petitioner's rights under the Due Process Clause.

[42] Compare *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963).

CONCLUSION

Petitioner was put in jeopardy of life or limb when he was tried pursuant to the defective information. The dismissal of the action by the trial judge, after all the evidence had been introduced but without entry of judgment, terminated this action. The Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment bar petitioner's retrial. The judgment of the court below should be reversed and all charges against the petitioner arising from this action should be dismissed.

Respectfully submitted,

/s/Conrad Kellenberg
CONRAD KELLENBERG
Court-Appointed Counsel
for Petitioner